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Supreme Court, U.S.
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No. 01-837

IN THE

# Supreme Court of the United States

MARTIN F. SLONIMSKY, as General Partner and/or Record Custodian of NATIONAL BUSINESS RESEARCH CO. EIN#77-0315950, as President and/or Record Custodian of NATIONAL BUSINESS RESEARCH CO. FL Corp. No. 96000002478, as General Partner and/or Record Custodian of NATIONAL BUSINESS RESEARCH COMPANY LTD EIN 85-0683044,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## REPLY BRIEF

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## ARGUMENT

The decision of the Eleventh Circuit Court of Appeals is in conflict with the decision of the Second Circuit Court of Appeals. Because of a conflict in the circuits and because of the importance of jurisprudence in this area of the law, further review is warranted.

The government's reliance on *Bellis*, *Grant* and *Wheeler* for the proposition that "[t]he 'collective entity doctrine' applies even with respect to the records of a dissolved corporation, because dissolution does not change the essential character or nature of the records" is misplaced. (Opposition Brief 4). First, in *Bellis*, the United States Supreme Court held that a subpoenaed partner could not assert a Fifth Amendment privilege with respect to partnership records because he was still an agent of the dissolved partnership. *Bellis v. United States*, 417 U.S. 85 (1974). Consequently, because *Bellis* did not involve corporate records, it is not relevant to the above stated proposition. Moreover, although the Court in both *Grant v. United States*, 227 U.S. 74 (1913) and *Wheeler v. United States*, 226 U.S. 478 (1913) applied the collective entity doctrine with respect to the records of dissolved corporations, the validity of the collective entity rule was cast into doubt when a later decision of the United States Supreme Court, *Fisher v. United States*, created a new framework for deciding Fifth Amendment claims with respect to personally incriminating business documents. *See, e.g., In re Three Grand Jury Subpoenas Duces Tecum dated January 29, 1999 United States of America v. John Doe #1, John Doe #2, John Doe #3 ("John Doe")*, 191 F.3d 173, 181-82 (2d Cir. 1999).

In *Fisher*, the Court shifted the Fifth Amendment privilege analysis from the document's contents (the collective entity doctrine) to the act of producing those documents (the act-of-production doctrine). *Braswell v. United States*, 487 U.S. 99, 431-32 (1988) (Marshall, J., concurring). Under the *Fisher* Court's act-of-production doctrine, a Fifth Amendment claim

depends, not upon the character or nature of the subpoenaed documents, but, rather, upon whether the act of producing the documents is testimonial and incriminating. *Fisher v. United States*, 425 U.S. 391, 410 (1976). As such, the *Fisher* Court's act-of-production doctrine alters the doctrine enunciated in *Bellis*, *Grant* and *Wheeler*. Thus, in deciding whether a custodian of records has a Fifth Amendment privilege to refuse production of the records of a dissolved corporation, the focus is not upon the nature of the documents sought to be produced, as advanced by the collective entity rule, but, rather, the focus is upon whether the act of producing those documents would be testimonial and incriminating, as advanced by the act-of-production doctrine.

The government next states that "[p]etitioner errs in claiming . . . that the decision in this case conflicts with the decision of the Second Circuit. . . ." The Second Circuit, in *John Doe*, held that a former employee has a Fifth Amendment act-of-production privilege to refuse to produce corporate records. *John Doe*, 191 F.3d 173. The Eleventh Circuit decision of *In re Grand Jury Subpoena Dated Nov. 12, 1991 ("Paul")*, 957 F.2d 807 (11th Cir. 1992) (per curiam), on the other hand, is inapposite to that of the Second Circuit. Accordingly, in arguing that no conflict exists between the Eleventh Circuit, in the present case, and the Second Circuit, the government argues that Mr. Slonimsky is not a "former employee."

The government raised the red herring that Mr. Slonimsky was not a former employee for the first time before the appellate court. It never raised this issue at the district court level, either at the district court's adversarial hearing nor in its pleadings to the court. Moreover, the appellate court, in rendering its decision, did not address this issue. Instead, the appellate court found that because the facts of the present case were on point with the facts of the Eleventh Circuit's *Paul* case, which involved a former employee, the court was obligated under the principal of stare decisis to follow the mandate of the Eleventh Circuit, and, thereby, hold that Mr. Slonimsky, like the defendant in *Paul*, did not have a Fifth Amendment act-of-production privilege.

The government ignores Mr. Slonimsky's status as a "former" employee by asserting that Mr. Slonimsky "has not alleged or proved that he resigned or was terminated as an employee or officer of the corporations whose records were summonsed" and that Mr. Slonimsky relies "solely on the dissolution of the two corporations to establish his status as a 'former' employee." (Opposition Brief 7). However, the government fails to cite any authority whatsoever concluding that one qualifies as a "former" employee only if one has "resigned" or has been "terminated" from a corporation. Instead, the government cites two statutes and three cases to support the following:

> Under applicable Florida law, . . . the dissolution of a corporation does not automatically terminate an officer's status as an agent of the corporation. A dissolved corporation in Florida continues its existence while its affairs are being wound up by the directors.

(Opposition Brief 7).

The above stated is irrelevant in the present case. In the present case, Special Agent George Brito of the I.R.S. issued I.R.S. summonses to Martin F. Slonimsky as general partner and/or records custodian of National Business Research Co. (EIN #77-0315950), to Martin F. Slonimsky as president and/or records custodian of National Business Research Co. (FL Corp. #96000002478), and to Martin F. Slonimsky as general partner and/or records custodian of National Business Research Company LTD (EIN #65-0683044). National Business Research Co. was voluntarily dissolved and said dissolution was properly filed with the Secretary of State on March 18, 1996. National Business Research Company, LTD. was revoked as a corporation in Florida for failure to file an annual report on April 10, 1998. Both of these corporations are no longer in existence and are closed. No affairs need be wound up by its directors as its agents. The three summonses served in this cause relate to these two stated closed corporations.

Moreover, in the fall of 1996, a lawsuit was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida styled *Office of the Attorney General, Department of Legal Affairs, State of Florida, v. National Business Research Co., a dissolved Florida corporation, a/k/a American Private Publications, Gabriel Slonimsky, and Martin Slonimsky*, Case No. 96-22900 CA-02. There was an Agreed Permanent Injunction and Final Judgment ordered and signed by the court on March 25, 1997. The order of Permanent Injunction of March 25, 1997 states in pertinent part that,

> . . . [s]aid Defendants agree that they are restrained and enjoined from: . . .
>
> c) Owning, operating, participating in, controlling, directing, supervising, being employed at, or having any involvement in any business or entity that engages in telemarketing sales and envelope stuffing, as well as any business that sells or offers to sell any other type of work-at-home products or services, within the State of Florida or that contacts or sells such services or products to Florida consumers.
>
> 3. Defendants state that they have ceased all mailings, written and oral solicitations, and other promotional efforts effective December 5, 1996. Defendants further ceased accepting orders for goods or services as of February 7, 1997.

Thus, by agreement and through the force of a court order, the two companies named in the subject summonses were mandated closed years before the subject summonses were ever prepared and served. The filing of this Agreed Permanent Injunction and Final Judgment followed the dissolution of National Business Research Co.

Thus, when Mr. Slonimsky was served with the three Internal Revenue Service summonses requesting that he produce corporate documents, the affairs of the two corporations, whose

records are the subject of the relevant summonses, were not being wound up. Consequently, the alleged Florida law, as stated by the government, does not negate Mr. Slonimsky's status as a "former" employee. At the time that Mr. Slonimsky was served, and continuing through the present, Mr. Slonimsky was no longer associated, affiliated, employed, a general partner, officer, and/or records custodian of either National Business Research Co. or National Research Company Limited. Mr. Slonimsky is a "former" employee. Consequently, the decision in the present case is in conflict with the Second Circuit's *John Doe* decision.

## CONCLUSION

Based on the foregoing cases, facts, and reasoning, it is respectfully requested that this Court grant certiorari and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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